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Supreme Court of the United States

OCTOBER TERM, 1954

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Mastro Plastics Corporation and French-American Reeds Mfg. Co., Inc. respectfully pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered August 19, 1954 enforcing against your petitioners an order of the National Labor Relations Board dated March 13, 1953 insofar as the decree directs reinstatement with back pay of seventy-six alleged employees and of one Frank Ciccone.

Citations to Opinions Below.

The Intermediate Report of the Trial Examiner is unreported and is printed in "Appendix to Petitioners' Brief" in the Court of Appeals* at page 30. The prevailing opinion in the National Labor Relations Board is part

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* Hereinafter cited as "Board's Appendix" or "B. A."; this petitioners' appendix below will be cited as "P. A."

of its Decision and Order reported in 103 NLRB (No. 51) at page 511*; and is also printed in the record below at B. A. page 4. The opinion of the dissenting Board Members is at 103 NLRB 520 and is also printed in the record below at B. A. page 20. The opinion of the Court of Appeals printed in Record, p. 1047, hereto appears at 214 F. 2nd 462*; dissent at page 466. A petition for rehearing in that Court was denied without opinion.

Jurisdiction.

The undated decree of the Court of Appeals was entered on August 19, 1954, R., p. 1067, after denial of a petition for rehearing, R., p. 1058. The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act which bars from the remedial processes of the Act those employees who strike during the "cooling-off" period preceding termination of a collective contract is operative against unfair labor practice strikers.

2. Whether employees who strike against unfair labor practices during the term of a collective labor contract containing a covenant against "any strike" may be ordered reinstated.

Statutes Involved.

As to Question 1, the statutory provision involved is Section 8(d) of the National Labor Relations Act as

* For convenience the opinions of the Court of Appeals and the material portions of the Board's opinions have been reproduced as appendix hereto.

amended, 61 Stat. 136, 140; 29 U. S. C. §§151, 158(d). The text is:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

As to Question 2, the statutory provision involved is Section 13 of the National Labor Relations Act as amended, 61 Stat. 151, 29 U. S. C. §163. The text is:

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Statement.

Petitioning employers operate a plant in New York City at which there was in effect a collective-bargaining contract between them and Federal Labor Union No. 22045 A. F. of L. expiring November 30, 1950. The contract contained the following covenant:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

In August of 1950, an organizational drive was undertaken by a Local 65 of the Wholesale and Warehouse Workers Union (B. A. 39) among petitioners' employees and that Union filed with the N. L. R. B. on September 28th a petition for certification. Petitioners admittedly opposed the organizational drive of Local 65 on the ground that it was communist-controlled but believed that the incumbent Local 22045 was too weak to cope with Local 65 (B. A. 39-40). Petitioners therefore got in touch with a third union, Local 318 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, a union which had previously defeated Local 65, and brought about a series of meetings between the officials of Locals 22045 and 318 wherein it was proposed that the bargaining agency of the unit be transferred from the incumbent to Local 318. The incumbent, 22045, ultimately rejected the proposals for a voluntary transfer of the bargaining agency (B. A. 79-80). Thereafter petitioners, it is found, commencing on Friday, October 20th and terminating during the week of October

23rd (B. A. 53-54) supported an organizational drive among the employees to displace Local 22045 as their bargaining agent and to substitute Local 318 by prompting certain employees to engage in such a campaign, soliciting others to engage therein, assisting in the campaign and paying certain employees for time devoted thereto (B. A. 80-82, 85). On October 24th, Local 318 intervened in the pending certification proceeding before the N. L. R. B. wherein Local 65 was the petitioner.

Meanwhile the incumbent Local 22045, which, somewhat prematurely in the light of contract provisions and statutory requirements, perhaps because of the activities of Local 65, had on September 7th, 1950 demanded a wage increase of 12½¢ per hour (B. A. 40), served the statutory notice of termination or modification on October 10th, 1950 (B. A. 14). Then on October 20th it increased its wage demand to 25¢ per hour and added a demand for a 3% welfare fund (B. A. 44). On October 23rd it adopted a resolution to transfer its affiliation to a fourth union, Local 3127 of the Carpenters Union, A. F. of L.* The stated reasons for the transfer were that Local 3127, which had the same business representatives as Local 22045 and shared its office (B. A. 39) was better equipped to administer the demanded welfare fund and could better resist the raiding of Local 318 because it had the support of the Carpenters International, A. F. of L. (B. A. 55).

The notice of the increased monetary demands and the welfare fund demand together with the advice that the members of Local 22045 had determined to switch their allegiance to Local 3127 were, it is found, communicated

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* The prevailing opinion in the Court of Appeals treated Local 22045, the incumbent bargaining agent and Local 3127 as a single entity. This tends to obscure the effect of the provisions of Section 8(d). At all times material, the certification proceeding of Local 65 was pending undetermined before the Board.

to petitioners at a conference of October 25th (B. A. 55). Incongruously, however, on October 31, Local 22045 appeared in the pending representation proceeding and declined to consent to an election, stating its intention to file unfair labor practice charges which it actually filed on November 2nd (B. A. 139).

Between October 23rd and November 10th, Local 3127 was soliciting employees to become members. One of the solicitors was the employee Ciccone, a machine shop man.

On the morning of Friday, November 10th, petitioners posted a notice to the effect that a rumor of a strike to be called the following Monday had reached them and warning employees that a strike would be treated as a breach of contract and cause for replacement (B. A. 57).

In the early afternoon of that day, November 10th, Petitioners' President, Maccaferri, leaving the plant to attend a directors meeting, had a conversation with Ciccone wherein, it is found, he accused the latter of soliciting membership for Local 3127 in the plant in the course of his duties, which were of roving character, and he ordered Ciccone to confine his work to the machine shop (B. A. 60). At 2:50 P. M. Ciccone, with some other machinists, left the machine shop and went to the molding room for the purpose of obtaining Coca Cola from the dispenser in that department. En route he, with the others, passed through the packing room. Mrs. Maccaferri, a supervisor in the packing room, reported by telephone to her husband, Petitioners' President, then at the directors meeting downtown that Ciccone was out of his department. Maccaferri called Ciccone's foreman and the Personnel Manager of the plant and ordered them to discharge Ciccone which they did forthwith (B. A. 61-63).

Within ten minutes of Ciccone's discharge, the other employees of the machine shop walked out on strike (B. A.

65). Ciccone and another machinist, Pieromi, shouted to an employee in the buffing room of the finishing department a request to join them on the picket line and the men in that department complied in a group (B. A. 66-67). The picket line was established by Saul, a representative of both Local 22045 and Local 3127, but under the auspices of the latter union. Some, but not all of the employees in the remaining departments, joined the picket line before the end of the day shift. On the following day, Saturday, November 11th, some employees reported for work across the picket line but thereafter there was a complete shut-down of the plant until December 11th.

Maccaferri's discharge of Ciccone was based, it is found, upon a mistake of fact. Ciccone was not prohibited by the order given him in the early afternoon, even as that order was construed by Maccaferri, from going to the Coca Cola dispenser (B. A. 88). Neither the Union nor Ciccone ever brought the discharge to arbitration however, despite the contract provision (B. A. 1013) providing for review of discharge on the issue of whether "proper cause" existed therefor. All who walked out or failed to return to work, it is found, did so to protest Ciccone's discharge or because they respected the picket line (B. A. 91-92). Saul, the representative of 22045 and 3127 stated on November 11th, the day after the strike began that the reinstatement of Ciccone was the only issue at that time (B. A. 74). No other issue was thereafter raised. The year previous, in negotiating the contract in force at the time of the strike Local 22045 had demanded but had not secured a change of the discharge review provision to the effect that the review should precede, rather than follow the discharge (P. A. 1016).

On December 11th, more than sixty days after service of the notice of modification or termination, the plant

reopened with a group of employees who then crossed the picket line and notice of discharge for breach of contract was sent to all employees who had failed to return to work. No arbitration was instituted upon these discharges. It was not until March 12, 1951 that the dischargees, about seventy in number, gave notice through Local 3127 that they offered unconditionally to return to work.

The contract (P. A. 1005) provided, *inter alia*, that

> "The Employers recognize and acknowledge the Union (Local 22045—counsel) as the sole collective bargaining agency for all of their employees, with respect to wages, hours, and conditions of employment."

Also that:

> "The Employers shall employ and retain in their employ * * * only employees in good standing with the Union, except for those jobs which are now exempt."

It also contained a clause requiring new employees to join the Union after the statutory grace period; provided for discharge of Union delinquents and, rather unusually, provided for arbitral determination of questions arising out of union membership. A checkoff clause was also included (P. A. 1005-1006) and in addition to the no-strike clause quoted in the forepart of this statement a clause reading as follows (P. A. 1006):

> "Either party may avail itself of the arbitration procedure as set forth in Section 19 (the arbitration clause—counsel) to obtain a determination of whether a strike, work stoppage, or lockout has occurred."

The arbitration clause (P. A. 1011) covered

> "* * * differences * * * between either of the Employers and the Union or its members as to the

meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach * * *."

The discipline and discharge clause read:

"The Employers shall have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19 (the arbitration clause—counsel), provided the matter is referred by the Union to the Employers within seven days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, provided the same are not inconsistent with any of the express provisions of this agreement. The term 'proper cause', as used in this section, shall include, but shall not be limited to, violation of any Employers' rule or regulation."

Petitioners declined to reinstate the discharged strikers and unfair labor practice charges were prosecuted by the Board. Petitioners raised two defenses, the only matters now in issue, viz., that the employees had lost their status as such by striking within the proscribed cooling off period and that their strike in breach of contract was an unprotected activity.

In respect of the "loss of status" defense the Board majority, overruling the defense, held (BA 14) that Section 8(d)

". . . applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike

called and continued for issues apart from negotiation of a new or revised contract."

In respect of the breach of contract defense, the Board majority held that the strike was not a breach of the contract since it was in protest of

> "... matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the (petitioners)."

The prevailing opinion in the Court of Appeals sustained the Board on both points.

The jurisdiction of the Board to entertain the unfair labor practice charges rests upon the proven and conceded engagement of petitioners' plant in interstate commerce.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10(e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit (BA 1-3).

Reasons for Granting the Writ.

A. As to the "Loss of Status" Question.

The Congressional mandate underlying the "loss of status" question reads:

> "• • • Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of section • • • 8 • • • of this Act. • • •"

On its face the scope of the mandate is unambiguously universal and the strikers in the case at bar were squarely within the scope. The majority of the Board and of the Court below, however, would limit the universality of the language, so as to exclude the strikers herein. The language used in the prevailing opinions is, however, such that counsel cannot state the precise scope of the limitation, i. e. whether strikers are barred from claiming that they have been the victims of unfair labor practices only when they have frankly struck solely to secure a termination or modification of the contract or whether they are barred from claiming that they have been the victims of unfair labor practices in all cases other than those in which they have struck solely against unfair labor practices. There are many cases of strikes undertaken for purposes involving neither termination or modification nor unfair labor practices[1] and many strikes of mixed motivation.[2]

Qualitatively then, the importance of the question upon which review is sought appears to be that a Congressional mandate, in a matter not trivial, set out in unambiguous terms has been "amended by interpretation"[3] so as to

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[1] *Cf. Penello (NLRB)* v. *Int. Union UMW*, 88 F. Supp. 935, strike to reduce marketable stocks of coal, the contract containing a willing and able clause; Section 8(d) was held to be involved. In 1952 there were 403 "Recognition Strikes", 41 "Strengthening of Bargaining Position Strikes", 35 "Discrimination Strikes", 59 "Other Union Organization Strikes", 67 Sympathy Strikes", 79 "Union Rivalry or Factionalism Strikes", 181 "Jurisdictional Strikes", 3 "Union Regulation Strikes", and 4 "Other Interunion or Intraunion Strikes"; a total of 872 strikes not involving strict economic issues. The number of recorded strikes was 5,117. Monthly Labor Review, May 1953, Vol. 76, p. 508.

[2] In 1952, there were 240 strikes for commingled economic and organizational issues. The total of commingled and non-economic strikes would, hence, be 1,112, roughly 20% of the year's strike total of 5,117. Op. cit.

[3] *Local No. 3, United Packinghouse Workers* v. *NLRB*, 210 F. (2nd) 325, cert. den. Oct. 14, 1954, No. 124, ... U. S. .....

exclude one or more significant classes within the literal meaning of the mandate by opinions which leave in doubt the scope of the exclusions; this over the dissents of two *expertisse* adjudicators and one judge who joined in regarding the "amendment" as functionally destructive of the mandate.

Still examining the desirability of review from the qualitative side, it will be noted that the statutory language designating the strikes which will deprive a striker of his right to have an unfair labor practice charge prosecuted on his behalf is crisp and clear in the sense that it identifies the standard of conduct time-wise—a standard readily ascertainable by those expected to observe it. On the other hand the standard of conduct posed by the opinions below, even if univocal, is one presenting a host of imponderables, fact questions, law questions and credibility questions difficult enough for the employer to determine but hopelessly beyond the informational limitations,* the legal acumen and the general ability of those charged with observing the standard in the first instance—average employees—to determine. The latter standard is pregnant with the possibility of completely defeating the Congressional policy by the drumming up of non-contract strike issues, by the feeding of partial truths or other misinformation to employees—in short by the introduction of "ifs, ands and buts" into the otherwise simple equation that the average employee must solve. This consideration may not be a strong argument for reversal, but for a doctrine potentially destructive of Congressional policy by erosion to take root in the law without the prior scrutiny of this Court would

* For a case wherein employees struck in the honest but mistaken belief that a fellow-employee had been discharged for union activity see *NLRB* v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 (not yet officially reported), 26 Labor Cases ¶68,740.

seem to be a relinquishment of one of the most important functions of the Court.

Quantitatively also an authoritative resolution of the question is important. The risk of an employee in deciding whether to strike is, individually, a serious matter. Whether he can do so under the protections of the Act, as the Board contends in the instant circumstances or without the protections of the Act, as the literal mandate of Congress says, is a question of prime importance to him. No less serious is the determination of the employer; a choice between disrupting a going operation by reinstating in positions perhaps of superior grade and seniority employees antagonistic to the incumbents or of being amerced in substantial back pay without the benefit of the production normally represented by an outlay of wages. The number of employees under hazard of having to make such determinations runs into the millions.[1] The number of employers involved in strikes annually is in the thousands.[2] Their contractual relationships expire not once but recurrently, most often annually. The Act affirmatively contemplates that there shall be strikes.[3]

Moreover there is a conflict, at least in principle between the case at bar and the decision of the Eighth Circuit in *Local 3, United Packinghouse Workers.* v. *NLRB,* 210 F. (2nd) 325, cert. den. October 14, 1954, No. 124, U. S.

In the opinion below, the Second Circuit majority has this to say (p. 466):

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[1] In 1952, more than three and one-half million employees were involved in strikes. Monthly Labor Review, May 1953, Vol. 76, p. 508. Fifty-nine million man days were lost.

[2] In 1952 there were 5,117 recorded stoppages, some of them involving more than one employer. Op. cit. p. 508.

[3] *UAW* v. *O'Brien,* 339 U. S. 454.

> "In Local No. 3 etc. *v.* National Labor Relations Board, 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this but, if not, we find ourselves in respectful disagreement."

The problem in the *Packinghouse* case was whether employees who engaged in a wage strike more than sixty days after service of the modification notice but before the expiration date of the contract lost their status as employees for the remedial purposes of the Act. The *Packinghouse* contract contained a wage reopening clause but lacked a "no strike" clause. The Board[1] held that the strikers did not lose status. To arrive at this result the Board narrowed the construction of Section 8(d) to "strikes designed to secure termination or modification of collective bargaining agreements," and argued that a construction which would, in effect, "write a no-strike clause into every contract" would be destructive of this purpose.

The Eighth Circuit flatly rejected this construction of the Section citing with approval the following language of the District Court in a companion case[2]:

> "Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof."

The Second Circuit, in the passage quoted from its opinion, seems to be uncertain whether the basis of its own

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[1] *Sub nom. United Packinghouse Workers of America, CIO* (Wilson & Company, Inc.), 89 NLRB 310.

[2] *United Packinghouse Workers of America* v. *Wilson & Co. Inc.*, 80 F. Supp. 563.

holding is merely that unfair labor practice strikes are without the ambit of Section 8(d) or whether it goes further to hold that no strike other than one limited to the attainment of contract changes during the final sixty days of its existence is within the ambit of Section 8(d). If it intends to hold the former then the conflict between the Circuits would appear to be a conflict in principle, since the rationale of its holding must still be that Section 8(d) is limited in its purpose. If the Second Circuit intends to hold the latter then there is, of course, a direct conflict.

It should be noted that in the case at bar the Board majority grounded its rejection of the "loss of status" defense squarely on the doctrine announced in the *Packinghouse* case,* holding to the narrower construction of Section 8(d) (B. A. 14).

No extended argument to demonstrate the error of the decision sought to be reviewed in this aspect will be undertaken. The dissenting opinion of Chairman Herzog and Member Murdock (B. A. 20) which was adopted by Judge Swan as his own dissent well establishes that there is a very substantial question of statutory construction involved.

However one point, no doubt appreciated by the dissenting Board members although they did not emphasize it, should be drawn to the attention of this Court. This point is that there exist sound reasons why Congress drew the loss of status provision so broadly as to apply to "any" striker and so broadly as to proscribe strikes on a temporal standard rather than by their objective.

Whatever one might think of some of the concepts of the Labor Management Relation Act of 1947, it was no ivory tower enactment; the legislators had before them the realties of the industrial world. One of these realities is

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* The Board later abandoned the doctrine in the *Lion Oil Company* case, 109 NLRB No. 106.

that the renewal time of a contract very often presents not the simple case of a single internally cohesive union versus a single employer. As a matter of fact, human nature, the general law of contract and the "contract bar" doctrine of the Board combine to concentrate in that very period the incidence of inter-union rivalry and intra-union friction. When such a situation occurs the stresses are not bilateral but multilateral. Were the stresses merely bilateral the legislator's problem would be almost completely solved by making the act of the incumbent union in breach of its contract an unfair labor practice as Section 8(d) has done, the only possible exception being the case of the feigned spontaneous or nominally unauthorized walkout. But, as noted, the legislative problem is deeper because other stresses have been superadded—the drive of the non-incumbent union, the tactics of its apostolic employees, the response of the incumbent and its supporters, the attempt of rival political factions within the incumbent to make capital of the nuances of the bargaining exchange, actions of all contestants designed to put the employer "on the spot" and the employer's reaction to such actions. These superadded stresses are not controlled by an enactment binding merely the employer and the incumbent to bargain without stoppage.

Congress had to go further to control these superadded stresses. It did so by providing a sanction—the "loss of status" clause—binding every employee and applicable on an exclusively temporal basis to the critical period. In this way it could prevent disruption by the adherents of the non-incumbent union and by those who would seek to wrest the hegemony of the incumbent from its existing leadership; in this way also it could solve the problem of the unprovably feigned "spontaneous" walkout.*

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* Illustrated by the strike involved in *U. S. v. Int. Union, United Mine Workers*, 177 F. (2d) 129, cert. den. 338 U. S. 871.

Thus considered, the universality and the temporal standard of the "loss of status" clause are no mere verbal accidents; they are deliberately chosen to accomplish a result functionally related to the duties laid upon the employer and the incumbent union and the purpose they serve is to protect the flanks of employer and incumbent while they discharge those duties and also to protect the legitimate contestant.* This purpose would be wholly aborted were the reasoning of the decree below allowed to stand.

The purpose is evident on the face of the "loss of status" provision. The inclusion of both Sections 8 and 10 in the sanction bespeaks the design of disqualifying terminal period strikers not only as to unfair labor practices committed against them subsequent to the loss of status—for which the mention of the substantive Section 8 alone would suffice—but also as to unfair labor practices antecedent to the loss of status which was accomplished by denying access to the enforcement machinery of the Act, Section 10. Had Section 8 alone been mentioned it would be possible to argue in the case of an antecedent unfair labor practice that the striker enjoyed the status of an employee when the unfair labor practice injured him, hence a subsequent strike would not disqualify him. There is no reason which counsel can imagine for the addition of Section 10 by Congress unless it was to block this very argument; for all unfair practices committed after a striker has lost status are obviously covered by the disqualification

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* Had the case at bar arisen in a slightly different framework this would be apparent. Suppose that in the representation proceeding Local 65, had raised the objection that the strikers had lost their status and objected to their voting on that ground; the strike would have put it at a disadvantage by interrupting its peaceful missionary efforts. Is not this why Congress made the loss of status provision applicable to Section 9 (representation) proceedings?

from the benefits of Section 8. Universality of the sanction was thus achieved by the addition of Section 10.

It is therefore submitted that an additional reason for the grant of certiorari exists viz., that the review involves a question important to the administration of the Act in the sense that insofar as Congress had a purpose in using broad language, that purpose cannot be achieved by the narrow construction (or constructions) adopted below.

B. As to the Breach of Contract Question.

The main reliance of Petitioners herein is, of course, placed upon the "loss of status" point. Nonetheless reasons exist why this Court should review the decision below in respect of the breach of contract defense.

Normally, the question of whether particular conduct violates specific contractual commitments is too ephemeral a question to justify review by this Court. But implications of the contract point in the case at bar transcend the limitations of the particular fact situation in such a way as to superimpose upon state law, in matters in which the states are sovereign, the camel's nose of a federal jurisprudence such as had grown up under *Swift* v. *Tyson*;[1] and this in the face of an expressly contrary Congressional intent.

The construction, effect and validity of collective contracts are, apart from matters expressly regulated by Federal law such as the identity of the agent and the scope of its authority,[2] matters of state cognizance.[3]

The opinion of the N. L. R. B. insofar as it dealt with the breach of contract defense professedly leaned upon an

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[1] 16 Pet. 1.

[2] *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711.

[3] *Transcontinental & Western Air* v. *Koppal*, 345 U. S. 653.

interpretation of the contract* between the parties and not upon a construction of N. L. R. A. (B. A. 11, note 8). But observe the following language which is the heart of the opinion (B. A. 10):

> "In the present situation the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. . . . The November 10th strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and application of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees."

And the Court of Appeals uses the following language (A-5):

> "However, since the strike was caused and prolonged by the respondents unfair labor practice, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. * * * The right of employees to strike in resistance to unfair labor practice by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition (citation). Unfair labor practices in violation of the Act were in no way covered by the contract. . . .

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* Curiously the general counsel of the Board had successfully contended that no contract could be drawn which would permit a strike within the terminal period; hence a contract containing the celebrated "willing and able" clause could not be interpreted to permit a strike. *Penello (NLRB)* v. *Int. Union UMW*, 88 F. Supp. 935. Situations of this character emphasize the importance of the resolution of the questions here presented to the administration of the Act.

One might reasonably inquire why, if the Board and the Court of Appeals are not construing the Act rather than the contract, is the notion of unfair labor practice—a purely statutory concept* not found in the laws of most states—always coupled in the language of the opinions with the notion of contractual non-coverage. Is this an accidental concurrence or a matter of significance?

To answer this question, let us examine the findings of fact of the Board, disregarding its legal conclusion that the facts constituted unfair labor practices, and compare them with the contract coverage. These findings as to pre-strike conduct of the employer are succinctly summarized by the Trial Examiner as follows (B. A. 85):

> (a) inducing and encouraging the representative of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representative of Local 318 to engage in a campaign to displace Local 22045 as the bargaining agent of their employees;
>
> (c) sponsoring, supporting and assisting the organizational campaign of Local 318;
>
> (d) giving financial rewards to employees active in the organizational campaign of Local 318;
>
> (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions.

To these must be added the discharge of the employee Ciccone (B. A. 89).

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* *Aguilines* v. *N. L. R. B.*, 87 F. (2nd) 146.

But the subject matter of every one of these courses of conduct was dealt with in the contract! The recognition clause (quoted, *supra*, p. 9) excluded Local 318 from achieving recognition during the contract term, the union shop clause (quoted, *supra*, p. 9) prevented defections from the membership of Local 22045, the dues of Local 22045 were secured by checkoff and delinquency discharge clauses, membership status in Local 22045 was expressly made the subject of arbitration; whether there was proper cause for the Ciccone discharge was expressly made an arbitrable matter. Every finding was matter that involved the "meaning, interpretation, operation or application" of these clauses and "breach or threatened breach" of the recognition, union shop, checkoff and discharge clause, and even the claim, pressed unsuccessfully below, that the conduct of the employer constituted a constructive lockout was expressly made arbitrable (clause quoted, *supra*, p. 10).

It is thus abundantly clear that what has been done below is that petitioner's conduct has been adjudged not by applying the standards of contractual language and state law—which might or might not embrace the concept of unfair labor practices—but by applying the standard of whether the conduct breached the Federal Act. This is why the opinions, despite the disclaimer,[1] find it necessary to link the ideas of unfair labor practices and contractual noncoverage in an unbreakable couple.[2]

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[1] The ingenious disclaimer (B. A. 11, note 8) overlooks the recognition, union shop and discharge clauses.

[2] Half of the Board members voting on the issue (Murdock abstained) hold a no-strike clause inapplicable, in any event, to an unfair labor practice strike. (Houston, Styles.) The language of the Court of Appeals dealing with Section 13, though obscure, may reflect this view. This view, if it does not completely ignore Section 13, apparently regards the amendment as having "cancelled out" the Section.

Congress has, however, by Section 13 of the Act prescribed precisely the contrary. The Act, even before its amendment, did not

> ". . . purport to modify the body of law as to the legality of strikes . . ."[1]

and, since the amendment, it may not be construed to

> ". . . affect the limitations or qualifications on that right."

If this means anything at all,[2] it means that the scope of a limitation placed upon strikes by contract[3] cannot be adjudged by the Act nor by the statutory concept of unfair labor practices of Sections 7 and 8 of the Act. In determining the coverage of a contractual limitation the finding of unfair labor practices is not only irrelevant, but incompetent, and a conclusion based on that finding is error.

There is a fourfold reason why an error of this character should be reviewed by this Court. Firstly, it poses a problem of negotiation to the multitude of union negotiators and their management counterparts who annually sit down to negotiate contract changes and to their counsel who must draft[4] the outcome of the negotiations. This problem is deeper than might superficially appear for while most employers would not hesitate to contract to refrain from

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[1] *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 259.

[2] As (and if) counsel understands the Board's position (B. A. 12) the amendment rendered the section meaningless.

[3] Contractual limitations were contemplated in the amendment, the committee reports citing *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332, as an example of that type of limitation.

[4] Ironically, reading the Board's National Electric Products decision, 80 N. L. R. B. 995, as the Board explains it in the case at bar (B. A. 9-10), the employer who affirmatively contracts to commit an unfair labor practice fares better than the employer whose contract is lawful.

engaging in unfair labor practices, few of them would be willing to have their employees "adjudicate" the issues by striking. The assurance of freedom from business interruption is almost the only consideration and is normally the most important consideration running to the employer in a collective contract.[1] The question is therefore important to the administration of the Act.

Moreover, there is underlying the issue the very basic question of whether the law governing collective contracts in this aspect is the law of the state concerned or whether it is Federal law. Unfair labor practices, even when recognized by states, vary from state to state and from the Federal concept. The Federal Law, for example, recognizes union unfair labor practices, but the New York Law, presumably applicable to the instant contract, does not.

And if the criterion of unfair labor practices is to be applied to contract law, in what manner is a court in a damage action or a specific performance suit to adjudicate the issue in the face of the *Garner*[2] doctrine?

Finally, if the criterion be Federal, is the contract to be construed single mindedly regarding the rights of employees under a single section of the Act or *in favorem pacis* as the Act as a whole might imply.

It is respectfully submitted that the implications of the holding below are so far reaching and affect so many persons and involve such basic features of Federal jurisprudence that review by this Court is warranted.

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[1] A point discussed in the *Packinghouse* case, *Local No. 3 United Packinghouse Workers* v. *NLRB*, 210 F. (2d) 325, cert. den. Oct. 14, 1954, No. 124.

[2] *Garner* v. *I. B. T.*, 346 U. S. 483.

Conclusion.

The writ should run with respect to both questions presented.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Petitioners,
60 Wall Street,
New York 5, N. Y.

Dated New York, N. Y.
November 15, 1954.

APPENDIX A

Decree Sought to be Reviewed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD, Petitioner, *v.* MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC., Respondents.	No. 22905

Decree Enforcing An Order of the National Labor Relations Board.

Before:

CHASE, Chief Judge; SWAN & FRANK, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 13, 1953. The Court heard argument of respective counsel on April 8, 1954 and has considered the briefs and the transcript of record filed in this cause. On July 16, 1954, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondents Mastro Plastics Corp. and French American Reeds Manufacturing Co., Inc., New York City, their respective agents, successors, and assigns, shall:

Decree Sought to be Reviewed.

1. Cease and desist from:

(a) Discouraging membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of their employees, and encouraging membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of their employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Discharging or discriminatorily refusing to reinstate or reemploy employees for the reason that they engaged in strike or concerted activities protected by the National Labor Relations Act, as amended (hereinafter referred to as the Act),

(c) Sponsoring, or rendering assistance and support to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or to any other labor organization, to become collective bargaining agent of their employees;

(d) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organizations, to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

Decree Sought to be Reviewed.

(a) Offer Frank Ciccone and the employees named in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Frank Ciccone and the employees named in Schedule A for any loss of pay they may have suffered by reason of the Respondents' discrimination against them, in the manner described in the Remedy section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated June 11, 1952, as amended in the Board's decision and order dated March 13, 1953;

(b) Withhold all recognition from Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers as the exclusive bargaining representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Local 318 shall have been certified by the Board as the representative of such employees;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of employment accruing under the terms of this Decree;

(d) Post at their plant copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director, of the National Labor Relations Board for the Second Region, New York, New York, shall, after being duly signed by the Respondents' authorized representatives, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

ship in the charging union, encouraged membership in Local 318, and interfered with, restrained, and coerced Respondents' employees in the exercise of the rights guaranteed in Section 7 of the Act.

4. We also find, in agreement with the Trial Examiner, that the work stoppage of November 10, was a strike, rather than a lockout, but that it was clearly caused and prolonged by the cumulative effects of the Respondents' unfair labor practices culminating in the discriminatory discharge of Ciccone. The Respondents, however, strongly urge in their exceptions that the Trial Examiner was in error in finding that this strike constituted concerted activity which was protected by the Act. They make this contention on the basis of two affirmative defenses, both of which were found without merit by the Trial Examiner.

The Respondents first contend that the strike was an action in breach of contract and therefore cannot be held to be protected activity. The contract in existence between the Respondents and Local 22045, American Federation of Labor,[4] during the period of time pertinent here, contained a clause stating that:

> "The Union agrees that during the term of this agreement, there shall me no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

This contract did not expire until November 30, 1950, and the Respondents argue that the strike of November 10, taking place as it did during the term of this contractual pledge, breached the contract and is therefore not entitled

[4] The incumbent union at the Respondents' plant in the period in question. As related by the Trial Examiner, the membership of Local 22045 took steps shortly before the strike to transfer affiliation to the charging union.

Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Respondents have taken to comply herewith.

/s/ HARRIE B. CHASE
Judge, United States Court of Appeals for the Second Circuit

Filed:

/s/ JEROME N. FRANK
Judge, United States Court of Appeals for the Second Circuit

Decree Sought to be Reviewed.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, or in any other labor organization of our employees, or encourage membership in LOCAL 318, INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any terms or conditions of employment.

WE WILL NOT discharge or discriminatorily refuse to reinstate or reemploy any of our employees for engaging in strike or concerted activities protected by the Act.

WE WILL NOT recognize the aforementioned LOCAL 318, INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, as the exclusive bargaining representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified by the Board as the representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, or any other labor organization, to refrain from joining or assisting LOCAL 318, INTERNATIONAL BROTHERHOOD OF

to the protection of the Act under the *Scullin-Dyson* doctrine.[5] The Trial Examiner found on the contrary that the contract did not indicate an intention by either party to waive the usual right of self-help to correct abuses "unrelated to the actual operation of the contract or the normal relationship of the parties but arising, as in this case, from a wilful and serious violation of law designed to destroy the very foundation of that contract and that relationship". He further found that, as an equitable matter, the Respondents should not be allowed to assert, as a defense, a strike which was caused by their own wilful, deliberate, widespread and grave unfair labor practices.

The Board, under the *Scullin-Dyson* doctrine, has held that economic strikes in violation of no-strike contract clauses are not protected activity. In both the *Scullin* and *Dyson* cases, however, the Board noted the absence of any prior breach of contract or unfair labor practices on the part of the employer. In *National Electric Products*,[6] the doctrine was applied despite the fact that the strike stemmed from an action of the employer found to be in violation of the Act. In that case, the discharge of an employee for dual union activity was requested by the incumbent union and the employer acquiesced under the terms of the union-shop provisions of the parties' contract. The same contract contained a no-strike pledge but a strike was conducted by the employees at the plant in protest against the discharge. The discharge was found by the Board to be in violation of the Act under the *Rutland Court* rule[7] but the strikers were held to be engaged in unprotected activity because of the no-strike pledge. The Board majority held:

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[5] *Scullin Steel Company*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445.

[6] 80 NLRB 995. *Chairman Herzog* concurred specially in the decision, with *Board Member Houston* dissenting.

[7] *Rutland Court Owners*, 44 NLRB 587, 46 NLRB 1040, subsequently overruled by the Supreme Court in *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U. S. 355.

> "The right to strike, although protected by the Act, *may be waived by the employees in an agreement concluded through the collective bargaining process.* • • • As we have heretofore emphasized, 'no-strike' clauses • • • are designed to forestall the use of even permissive economic weapons and to substitute settlement by collective bargaining, and tend to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare". (emphasis supplied)

We do not consider that the *National Electric Products* case furnishes authority or rationale for sustaining the Respondents' defense here. The essential differences between the facts of the cases are patent. In the earlier case, the discharge which instigated the strike was an action required by and in accord with the contract between the representative of the employees and their employer. In the present situation, the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. In the *National Electric Products* case, the employees waived their right to strike action as to matters settled and agreed upon in the contract. In the instant case, we can perceive no rational or legal basis on which to assume that the employees contemplated or, in fact, executed a waiver of self-help under the conditions imposed by the Respondents which gave rise to the strike of November 10. The contract itself provides for arbitration, rather than strike or lockout economic pressure, to settle "differences • • • between either of the Employers and the Union or its members as to the meaning and application of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." The November 10 strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and appli-

Decree Sought to be Reviewed.

PULP, SULPHITE AND PAPER MILL WORKERS, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Castaldo, Louis
Capers, Flora
Cartagena, Luis
Cascione, Michael
Cheli, Gaetano
Ciccone, Frank
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris
Gibson, Vernal
Golpe, Peter
Gonzales, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Martone, Camille
Matera, Joseph
Messina, Agnes
Migliore, Anthony
Miller, James
Occhino, Mary
Oleszek, John
Olker, Marie
Pasculli, Jane
Pastore, Carmine

cation of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees.

On the entire record, we find that the no-strike clause of the contract between the Respondents and Local 22045 did not contemplate or incorporate a waiver of strike action on the part of the employees under the circumstances present on November 10.[8] Accordingly, we find no merit in the contention of the Respondents that the strike of that date was in breach of contract and was activity unprotected by the Act.[9]

The Respondents also contend, as an affirmative defense, that the strike was in violation of the terms of Section 8 (d) of the Act and that, as a result, the participants lost their employee status under the mandate of that section. The Board Members, otherwise unanimous, divide on this issue.

The Trial Examiner rejected this defense on the ground that Section 8 (d) was not applicable to an unfair labor

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[8] The Board also finds no merit in the Respondents' contention that Section 13 of the Act prevents the Board from overruling the breach of contract defense. Section 13, discussed more fully hereafter with regard to the Respondents' second affirmative defense, enjoins constructions *of the statute* which "affect" limitations on the right to strike. It is sufficient to note, in this regard, that it is not the Act or any part thereof which has been construed herein to limit the no-strike clause, relied upon by the Respondents, but the terms and scope of that clause itself.

[9] *Chairman Herzog*, although dissenting as to the disposition made of the second defense raised by the Respondents, concurs in the finding that the strike herein was not in breach of contract. The *Chairman*, like the Trial Examiner, calls attention to the rationale contained in his concurring opinion at page 1002 of the 1949 *National Electric Products* decision. *Member Peterson* joins in this rationale.

Member Murdock reserves opinion on the breach of contract issue which it is unnecessary for him to reach in view of his dissenting conclusion that Section 8 (d) deprived the strikers, in any event, of the status of employees protected by the Act.

Members Houston and Styles, while concurring in the finding that this particular contract no-strike clause did not contemplate a waiver of self-help under the conditions present herein, would further find that a no-strike clause is inapplicable where a strike is caused by the unfair labor practices of the employer.

Flamio, Yolanda	Saxton, John
Fonagy, Adelaide	Schultz, Henry
Franchi, Fred	Shaw, Ruth
Gherardi, Dorothy	Sills, Estelle
Paul, Henry	Smith, Isiah
Pellay, Richard	Smolen, Madeline
Petrus, Elizabeth	Tommarello, Frank
Pieroni, Peter	Tripolone, Salvatore
Pollina, Charles	Unger, Alexander
Prieto, Rafael	Valentine, Michael
Radice, Antoinette	Vargas, Henry
Rivera, Patricio	Weinberg, Leopold
Sanchirice, William	Zimmerspitz, Abraham
Sandhop, William	Zinzi, Michael
Squillate, Frank	

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named Local 3127, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

Mastro Plastics Corp.

By .....
(Representative) (Title)

Dated.....

French-American Reeds Manufacturing Co., Inc.

.....
(Employer)

By .....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

practice strike not called or continued in order to force modification of a contract. The Respondents except to this ruling on two grounds. First, they assert that Section 13 of the Act prohibits the Board from construing the Act and Section 8 (d) so as to affect limitations on the right to strike. Secondly, they dispute the conclusion of the Trial Examiner on the ground that Congress clearly intended to prohibit all strikes, economic or unfair labor practice, during the 60 day period specified in the statute.

The lack of merit in the first of the Respondents' arguments on this issue is inherent in the language of Section 13, itself. That Section provides that:

> "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right".

Section 13, it is therefore clear, prohibits constructions of the statute affecting limitations on the right to strike. It also, however, prohibits constructions which "interfere with or impede or diminish in any way" the right to strike except as *specifically* provided for in the Act. This two-edged approach of the section is as much a legal barrier, therefore, to a Board construction broadcasting the scope of Section 8 (d), if the limitation on strikes in that section is clearly to apply only to strikes to force contract action, as it is to restricting the limitations on strikes in that section if Section 8 (d) is clearly to apply to any strike. It is apparent, accordingly, that the issue must be resolved by the terms of Section 8 (d) alone.

Section 8 (d) provides, in part,

> "That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively, shall also mean that no party to such contract shall terminate

Decree Sought to be Reviewed.

Schedule A

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Capers, Flora
Cartagena, Luis
Cascione, Michael
Castaldo, Louis
Cheli, Gaetano
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris
Flamio, Yolanda
Fonagy, Adelaide
Franchi, Fred
Gherardi, Dorothy
Gibson, Vernal
Golpe, Peter
Gonzalez, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Matera, Joseph
Messina, Agnes
Migliore, Anthony
Miller, James
Occhino, Mary
Oleszek, John
Olker, Marie
Martone, Camille
Pasculli, Jane
Pastore, Carmine
Paul, Henry
Pellay, Richard
Petrus, Elizabeth
Pieroni, Peter
Pollina, Charles
Prieto, Rafael
Radice, Antoinette
Rivera, Patricio
Sanchirice, William
Sandhop, William
Squillate, Frank
Saxton, John
Schultz, Henry
Shaw, Ruth
Sills, Estelle
Smith, Isiah
Smolen, Madeline
Tommarello, Frank
Tripolone, Salvatore
Unger, Alexander
Valentine, Michael
Vargas, Henry
Weinberg, Leopold
Zimmerspitz, Abraham
Zinzi, Michael

APPENDIX B

Opinions of Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—OCTOBER TERM, 1953.

(Argued April 8, 1954 Decided July 16, 1954.)

Docket No. 22905

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

MASTRO PLASTICS CORP., and FRENCH-AMERICAN REEDS MFG. CO., INC.,

Respondents.

Before:

CHASE, Chief Judge, SWAN and FRANK, Circuit Judges.

Petition for enforcement of an order of the National Labor Relations Board. Order enforced.

GEORGE J. BOTT, General Counsel,
DAVID P. FINDLING, Associate General Counsel,
A. NORMAN SOMERS, Assistant General Counsel,
BERNARD DUNAU,
HARVEY B. DIAMOND,
Attorneys,
National Labor Relations Board, Petitioner.

BUTLER, BENNETT & FITZPATRICK, Attorneys for Respondents, Bernard H. Fitzpatrick, of Counsel.

cation is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended*, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (emphasis supplied)

The contract herein, between Local 22045 and the Respondents, expired on November 30, 1950. The formal notice of an intent to modify the contract was not served on the Respondents by Local 22045 until October 10. It is the Respondents' contention, therefore, that as the strike admittedly took place less than 60 days after the notice was tendered, the strikers lost their status as employees. As noted, the Trial Examiner rejected this argument finding that Section 8 (d), viewed in its entirety, applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike called and continued for issues apart from negotiation of a new or revised contract.

The Board has previously construed Section 8 (d) as having the "prime purpose" of preventing "so-called 'quickie' strikes designed to secure termination or modification of collective bargaining agreements".[10] Moreover, in the recent *Thayer* case,[11] where the section was also posed as a defense in an unfair labor practice strike situation, the Board indicated clearly that it considered the

[10] *United Packinghouse Workers of America, CIO (Wilson & Company, Inc.)*, 89 NLRB 310, which concerned another, different problem arising from the enforcement and administration of the section.

[11] *H. N. Thayer Company, et al.*, 99 NLRB No. 165, where the Board grounded its rejection of a Section 8 (d) defense on the specific facts of the case, where the striking union was never recognized as the representative of the employees and thus was not a party to the contract subject to the restrictions of Section 8 (d).

CHASE, Chief Judge:

Local 3127, United Brotherhood of Carpenters and Joiners of America, the bargaining agent for respondents' employees, filed charges against Mastro Plastics Corp., and French-American Reeds Manufacturing Company, Inc., two New York corporations which, though separate corporate entities with separate payrolls, are under the same management, have the same employees and use the same plant. The charges, as amended, were that the respondents had engaged in unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Labor-Management Relations Act, 1047, 29 U. S. C. A. §141 *et seq.* The substance of them was that the respondents by various unlawful means aided Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, in attempting to become bargaining agent for the respondents' employees during a time when they were represented by Local 3127; that an employee, one Frank Ciccone, was discriminatorily discharged because of his membership in, and activities on behalf of, Local 3127, and because of his refusal to join Local 318; that 76 other employees were unlawfully locked out or discharged for the same reasons; and that applications for reinstatement by these employees were rejected. The relief sought was a cease and desist order and reinstatement of the discharged employees with back pay.

Respondents' answer admitted the discharge of Ciccone and the other 76 employees, but denied allegations of unfair labor practices. For affirmative defenses, it was alleged that Ciccone was discharged for violating the instructions of his superiors and that the employment of the remaining 76 employees was lawfully terminated because they went on strike in violation of a collective bargaining contract and of Section 8(d) of the Act.

Hearings were held before a trial examiner in New York in March, 1952; findings sustaining the charges were made

ambit of Section 8 (d) to be limited in scope to the contract modification or termination area. There we held that

> . . . . by its terms [Section 8 (d)] applies only to strikes to terminate or to secure a modification or interpretation of a collective bargaining contract. The finding that the present strike was an unfair labor practice strike therefore takes the strike itself outside the purview of Sec. 8 (d)"[12].

While it is true that the Board did not find it necessary to base its rejection of the Section 8 (d) contention in that case upon the ground quoted, we find no reason to reject the reasoning expressed therein. Although the Respondents and our dissenting colleagues contend that the Congress intended that all strikes, economic or unfair labor practice alike, should be covered by the prohibition in that section, we fail to discern any such intention expressed by proponents of the legislation when it was enacted in 1947. The section itself, as we have pointed out, is unmistakeably designed to control and deal with a distinct facet of labor-management relationships, *i. e.*, the critical period of collective bargaining negotiations preceding the termination or modification of a contract. The Congressional concern and intent, as reiterated many times during consideration of the section in 1947, was to prevent the use of economic pressures such as strikes and lock-outs for reasons connected with contract negotiation from impending or disrupting collective bargaining during that critical period.[12] In short, the Congress prohibited either labor

[12] See, for example, the statement of Senator Ball, a proponent of the 1947 amendments including Section 8 (d). He stated, in defining the objectives of the latter: "The provision in the National Labor Relations Act defining collective bargaining, and providing where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect (sic) [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision aimed primarily at protecting the public, as well as the

except as to the alleged lockout; and it was recommended that the affirmative defenses, which were established in point of fact, be held legally insufficient. On review the Board adopted the findings, conclusions and recommendations of the examiner, with one exception not relevant here, and the respondents were ordered, two members of the Board dissenting, to cease and desist from their unfair labor practices and to reinstate with back pay Frank Ciccone and the other 76 employees named. The unfair labor practices are no longer contested and the only part of the Board's order which is in contention is that requiring reinstatement of employees with back pay.

The facts are set forth in 100 N. L. R. B. No. 51, and only a brief resume of them is now needed. Since 1948, when Local 3127[1] was certified by the New York State Labor Relations Board, it has been the bargaining agent for the respondents' employees. In August of 1950, Local 65 of the Wholesale and Warehouse Workers Union, which was regarded by the respondents as being communist dominated, started organizational activities among the employees. To combat Local 65 the respondents sought to replace Local 3127 with Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, the latter being a much stronger union, and from the middle of September until November 20, 1950, the respondents committed rather flagrant unfair labor practices to achieve that end. Local 318 was encouraged, sponsored, and actively assisted by the respondents in signing up the employees; some employees were rewarded for aiding Local 318; and the respondents' officers and supervisors made promises of benefit and threats of reprisal related to membership in

[1] Also involved in dispute with the respondents was Federal Labor Union, Local 22045. But, as Local 22045 and Local 3127 were represented by the same persons, used common offices, and as the representation rights of respondents' employees were at various times shifted by them between the two unions, we shall refer to them jointly as Local 3127.

the rival unions. These activities culminated, on November 10, 1950, in the discharge of employee Frank Ciccone because of his activities on behalf of Local 3127 and his opposition to Local 318. His discharge precipitated a strike which, by the following day, involved all of the respondents' employees, and which lasted until March 9, 1951, when application for reinstatement of striking employees was made and denied as to Ciccone and the seventy-six who have been ordered reinstated with back pay.

About three months prior to the applications for reinstatement, on December 11, 1950, some of the respondents' employees returned to work and a form letter was sent to all employees remaining on strike notifying them that their employment had been terminated by reason of their striking in violation of the collective bargaining contract. The contract provision upon which the respondents relied reads as follows:

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

As "the term of this agreement" did not expire until November 30, 1950, the strike did occur during the term and so it is contended that the strikers, by breaking the contract, lost the right to reinstatement.

However, since the strike was caused and prolonged by the respondents' unfair labor practices, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. That clause must be interpreted in the light of the entire contract of which it is an integral part, not as an isolated waiver unrelated to the rest of the agreement, and the inhibition it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out

of the normal relations of the parties. Instances of strikes to enforce changes in contract provisions which violate a no-strike clause, of which *Scullin-Steel Company*, 65 N. L. R. B. 1294; and *Joseph Dyson & Sons, Inc.*, 72 N. L. R. B. 445, are examples, should be distinguished. The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition. See *National Electric Products Corporation*, 80 N. L. R. B. 995. Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, the respondents' unlawful activities cannot be considered part of the normal relations of the parties.

The respondents also argue that, even if the no-strike clause was not a waiver of the right to strike as to matters outside the contract, it was violated because the strike was caused by the discharge of Ciccone, which was an arbitrable matter under the contract, and that the strike was continued for the sole purpose of securing Ciccone's reinstatement. Were this assertion accurate as to the cause of the strike and its continuation we would agree. However, the Board found that the strike was caused and prolonged solely by the respondents' violations of the Act. Ciccone's discharge was regarded by the Board, and by the trial examiner, as the spark which set off the strike, not as the essential cause of it, and the evidence amply supports this conclusion.

The main contention by the respondents is that their affirmative defense based on Section 8(d) of the Act, 29 U. S. C. A. 158(d), should have been sustained. On October 10, 1950, Local 3127 notified the respondents in the required manner of their desire to negotiate for the modification of the existing collective bargaining contract. This brought into operation Section 8(d), which provides that

contracts may not be modified except under certain circumstances; the party seeking modification must serve notice on the other party sixty days prior to the time of the proposed modification, there must be an offer to meet and confer for purposes of negotiation, mediation agencies must be notified, and the existing contract must be continued in full force and effect during the sixty day period following notification, without resort to strike or lock-out. It is further provided in subdivison (d)(4) that "Any employee who engages in a strike within sixty-day period * * * shall lose his status as an employee * * * for the purpose of sections 8-10 of this Act * * * "

If the word "strike" in the just mentioned subdivision is to be read as meaning "any strike" however caused and regardless of its objectives, all of the strikers ceased to be employees when they went on strike and none were entitled to reinstatement.

The Board has found by adopting the trial examiner's findings which were based upon ample evidence that the strike was caused solely by the unfair labor practices of the respondents and was not motivated by any purpose so to obtain any economic advantage by way of contract modification. And so the question is squarely presented as to whether the statutory deprivation of employee status applies to strikers whose sole purpose is to protest against unlawful conduct on the part of the employer and to remedy unfair labor practices which constitute such conduct.

In order to arrive at the true meaning of the word "strike" as used in this subsection, its relation to the purpose of the subsection as a whole must be given due consideration. Though some statutes may be so simple in language and purpose that when all the words are read literally and inclusively the exact meaning clearly appears, often that is not so and it isn't in this instance. As usually must be done in interpreting a statute, all of its provisions should be read in the light of the legislative purpose and with reference to each other. *United States* v. *Boisdore's Heirs*, 8 How. 113; *Duparquet Co.* v. *Evans*, 297 U. S. 216.

Section 8(d)(4) of the Act deals with the obligation to bargain collectivgly in good faith and particularly with the termination or modification of existing bargaining contracts. After making provision for procedures looking toward the attainment of such ends, which contain conditions applicable both to employer and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargaining contract. The "sixty-day period" is a special period during which the *status quo ante* is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method. Were this not so, we would have to attribute to Congress the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it too hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their condition by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an

intent should not be attributed to Congress until, and unless, it sees fit to say so in clear and uncertain terms.

It has been said that the provision in Section 13 that, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications upon that right" requires a conclusion opposite to that reached. That, of course, is not so unless we are wrong in holding that there is no limitation upon the right to participate in an unfair labor practice strike. In so far as here relevant, it presupposes a limitation and has no significance as to whether there is one. In *Local No. 3 etc.* v. *National Labor Relations Board,* 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this but, if not, we find ourselves in respectful disagreement.

A motion by the respondents to reopen the proceedings for the introduction of additional evidence as to the meaning of the no strike clause in the contract was made before the Board and denied. A motion has been made here to remand to the Board for that purpose pursuant to Section 10(e) of the Act. Apparently the movants had an opportunity to adduce such evidence at the hearings and failed to avail themselves of it. At least we are not satisfied by the showing here made that there are reasonable grounds for their failure to present such evidence at those hearings and the motion is denied.

Order enforced.

SWAN, Circuit Judge, dissenting in part:

For the reasons well stated in the opinion of the dissenting members of the Board, I would deny enforcement of the reinstatement provisions of the order.

APPENDIX C.

Opinions of National Labor Relations Board.

Decision and Order.

103 NLRB No. 51 D-7020
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter

of

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

Case No. 2-CA-1799.

On June 11, 1952, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report together with supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error

was committed.[1] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:[2]

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[1] During the course of the hearing, the Board denied the Respondents leave to appeal several rulings of the Trial Examiner on the ground that the issues could best be resolved on the basis of a full record. The Respondents moved to strike all allegations of the complaint which concerned the strike at the Respondents' plant and the strikers on the ground that the employee status of the strikers had become a representation matter. During the strike at the Respondents' plant, the Board issued a Decision and Direction of Election, Case No. 2-RC-3170, January 29, 1951, not reported in printed volumes of Board decisions. The petition in that case was filed by the charging union herein. The Direction contained the proviso that strikers and replacements could vote under challenge and was later amended to defer the election until "such time as the Regional Director deemed appropriate" because of the filing of the charges in the instant case. The Respondents contend, in their motions to strike, that the Board was without power to refer issues concerning the strikers to a Trial Examiner and that the Trial Examiner was without jurisdiction to hear evidence on such issues because Section 9 (c) of the Act provides that representation matters should be heard by an officer or agent of the Board who can make no recommendations. The Trial Examiner denied the motions based on this argument and his ruling is hereby affirmed. Cf. *Times Square Stores Corporation*, 79 NLRB 361.

[2] The following minor corrections of the Trial Examiner's findings are noted. (1) While the Union's notice of intent to terminate or modify the contract was dated September 29, 1950, it was not delivered to the Employer until October 10; (2) The evidence clearly shows, as found by the Trial Examiner and adopted by the Board, that Maccaferri feared that Local 22045 was not strong enough to cope with the organizational efforts of Local 65 the Wholesale and Warehouse Workers rather than, as inadvertently noted at one point in the Intermediate Report the efforts of Local 318 of the Paper Mill Workers; and (3) The Trial Examiner, having found and concluded correctly that the Respondents had unlawfully assisted and supported Local 318, inadvertently stated, under the heading "Concluding findings" that the Respondents thereby violated Section 8 (a) (3) of the Act by such conduct rather than Section (a) (2). None of these inaccuracies or inadvertencies in the Trial Examiner's Report is of such a nature as to affect his ultimate conclusion, or our concurrence therein.

Opinions of National Labor Relations Board.

1. The Board finds, as did the Trial Examiner, that the Respondents engaged in extensive interference, restraint, and coercion of their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8 (a) (1) of the Act.

2. The Board finds, as did the Trial Examiner, that the Respondents rendered unlawful support and assistance to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, and thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act. The General Counsel excepts to the failure of the Trial Examiner to recommend that the Respondents withhold recognition from Local 318 unless and until such time as it might be certified by the Board as the bargaining representative of Respondents' employees. In view of the nature and extent of the Respondents' support and assistance as shown by the record, we find merit in the exception. Accordingly, in order to restore the status quo and to free the employees from this restraint upon their freedom to achieve self-organization, we shall order that the Respondents withhold all recognition from Local 318 as the representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it is certified by the Board as such representative.[3]

3. We further find, in accord with the Trial Examiner, that the Respondents discriminatorily discharged, and thereafter refused to reinstate, Frank Ciccone because of his organizational activities in support of the charging union. It is clear that this discharge and refusal to reinstate, motivated by Respondents' support of Local 318 and its animus toward rival organizations, constituted a discriminatory action with regard to Ciccone's hire and tenure of employment which thereby discouraged member-

[3] See *Julian Freirich Co., et al.*, 86 NLRB 542.

or modify such contract; unless the party desiring such termination or modification

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;*

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modifi-

or management from using strike or lock-out pressures in the frame of contract negotiations in preference to peaceful bargaining devices. To adopt the view of our dissenting colleagues would be to find that Congress intended, despite this clear concern and attention throughout the section to contract negotiation, to render a labor organization helpless for a set period against unfair labor practices totally unconnected with the problems of contract termination or modification. This view we cannot ascribe to Congress in the absence of any expressed legislative intent or desire.

Accordingly, we find that Section 8 (d) did not deprive the strikers at Respondents' plant of their employees status. In accord with the Trial Examiner, we further find that by discharging the employees listed in Schedule A, attached hereto, on December 11, 1950, and thereafter refusing to reinstate said employees following unconditional application for reinstatement made on their behalf, the Respondents violated Section 8 (a) (1) and 8 (a) (3) of the amended Act. Like the Trial Examiner, we shall therefore order the Respondents to offer to the employees listed on Schedule A, together with Frank Ciccone, full reinstatement to their former or substantially equivalent positions as set forth in the Intermediate Report under the heading "The remedy". We note, however, that while the application for reinstatement was made on March 9, 1951, it was not received by the Respondents until March 12. Accordingly, back pay for employees listed in Schedule A shall be assessed from March 12 rather than the earlier date.

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employee, who have been the victims of 'quickie' strikes. I do not think that is taking away the rights of labor or of unions either one; it is simply saying that they should all follow the sound, fair, and sane procedure which a majority of the good ones now follow." (Congressional Record, 80th Congress, May 12, 1947, p. 5146.)

PAUL M. HERZOG, CHAIRMAN, and ABE MURDOCK, MEMBER, dissenting in part only:

While we find, in agreement with our colleagues, that the Respondents clearly committed violations of Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act, we are unable to join in the conclusion of the majority opinion that the strike of November 30 was protected activity. It is our considered belief that the strike on that day was in contravention of the explicit mandate of Section 8 (d) of the present Act and that the strikers, as a result, lost the status of employees protected by the statute.

Section 8 (d), as noted in the majority opinion, directs that contracts shall not be modified or terminated unless certain specified conditions are met. Among those conditions are provisions for a 60-day notice prior to the date of the desired modification or termination, and for notification to mediation agencies of the existence of a dispute. As our colleagues of the majority admit, Congress in enacting the provisions of Section 8 (d) was concerned with the problem of industrial unrest that often arises when collective bargaining contracts are in process of revision or termination. There is no question but that Congress concluded that labor-management relationships could be stabilized by enforcing certain specified rules to govern and control the parties' actions during these periods of stress and possible conflict. The provision was accordingly added that resort to the economic weapons of strike and lockout was forbidden to both employers and employees during the 60-day period following notice of intent to terminate or modify a contract. The prohibition was then emphasized, although only insofar as employees are concerned, by the additional sanction of loss of employee status for workers who engaged in strikes during that period.

There is no question here but that the strike of November 30 was called and conducted before the expiration of the 60-day period following the Unions notification to the

Respondents that it wished to revise the contract then about to terminate. We agree with our colleagues' finding that the strike was one caused and precipitated by the Respondents' unfair labor practices. The instant case thus poses the question whether Section 8 (d) permits the Board any discretion to differentiate between types and classes of strikes according to their motivation, or to apply the sanction of the statute to some, but not all, strikes. We believe the answer must be in the negative.

The language used in Section 8 (d) does not distinguish as to what types of strikes or lockouts are prohibited during the 60-day period. The instruction to labor, management and this Board is short and explicit. The parties must continue the provisions of the contract in full force and effect during this period "without resorting to *strike or lockout:*" Any employee "who engages in a *strike*" within the 60 days shall lose his status as an employee. No limitation or qualification, express or implied, appears in the text to indicate a Congressional intent to limit the sanction to "economic strikes" and to allow freedom of action to those striking in response to unfair labor practices. The coverage is clear and all inclusive. If, as urged by the majority, the Congress did intend to limit the scope of the prohibition to economic strikes or, at most, to strikes within the frame of contract negotiation, the section is barren of any supporting indication. On the contrary, we consider that this very failure to incorporate any such qualifying language, when it might easily have been added, underlines the fact that the clear intent of the section was to prohibit all work stoppages during this period.

Section 8 (d) being plain and unambiguous in this respect, there is no need to resort to legislative history to plumb its meaning.[14] The Congressional hearings and debates which accompanied its enactment, if considered, however, make the majority opinion interpretation of the

[14] *N. L. R. B.* v. *Dant & Russell, Limited*, 73 S. Ct. 375.

section even more untenable. The opponents of the Taft-Hartley revisions of the Wagner Act in 1947, on numerous occasions noted and emphasized the broad coverage of Section 8 (d). Thus, the Senate Minority Report stated:[15]

> "Moreover, the section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, *employees unwilling idly to countenance abuse, who resort to self-help under the circumstances, are removed from the protection of the statute and lose 'employee status.'* An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice. *The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of 'clean hands'. The provisions of the section are conclusive—the employee is subject to summary dismissal irrespective of the employer's conduct.*" (emphasis supplied)

To this, as to other statements of the same tenor, no denial was made by the proponents of the legislation. The Senate Majority Report,[16] indeed, reiterated that "any employee who engaged in a strike during the 60 day period [specified in Section 8 (d)] would lose any rights under Section 8, 9, and 10 of the Wagner Act, unless and until he is reem-

[15] Senate Minority Report No. 105 page 2 on S. 1126, 80th Congress.

[16] Senate Report, No. 105 on S. 1126, 80th Congress.

ployed." Even apart from the clear import of the statement, its reference to the loss of rights under Section 8 would be pointless unless Section 8 (d) was clearly to include unfair labor practice strikes with all other strikes among the prohibited conduct.

It is true that the Board has, on prior occasion, referred to the "prime purpose" of Section 8 (d) as being to eliminate "quickie strikes." However, the fact that such strikes, presumptively economic, were the prime object of the statute, cannot diminish the broad wording of the section or the wider area of action which it also was intended to govern. Nor is the *dictum* of the *Thayer*[17] case, which admittedly was decided on a totally different ground, controlling. While the result of the application of Section 8 (d) in the instant case may indeed appear inequitable in the light of the extensive unfair labor practices committed by the Respondents, such equitable considerations are not within our power to apply. To us, the conclusion is inescapable that Congress determined in 1947 that the cause of industrial peace would best be served by total elimination of the use of economic weapons, no matter what the provocation, during the critical period of contract renegotiation. As this determination was made a part of the statute in Section 8 (d), it is not the province or the prerogative of this Board to question or to alter it.

Accordingly, as the strike of November 10 was called and conducted before the end of the 60-day period specified by the statute, we must find that it was not protected concerted activity and that the strikers lost the status of employees entitled to reinstatement.

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[17] H. N. Thayer Company, 99 NLRB No. 165.